

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of L.C.,)	
Merrillville Community School Corp.,)	
and the Northwest Indiana Special)	
Education Cooperative)	Article 7 Hearing No. 1142.00
)	
Appeal from a Decision by)	
Dennis D. Graft, Esq.)	
Independent Hearing Officer)	

Procedural History

L.C., a fourteen-year-old eighth grade student attending a middle school in the Merrillville Community School Corporation (collectively with the Northwest Indiana Special Education Cooperative referred to as the School), requested on January 13, 2000, a due process hearing under 511 IAC 7-15-5 to challenge the appropriateness of the Student's current Individualized Education Program (IEP). Dennis D. Graft, Esq., was appointed as the Independent Hearing Officer (IHO) on January 14, 2000. The IHO issued a pre-hearing order on January 20, 2000, setting the matter for a pre-hearing conference by telephone on January 25, 2000. However, the pre-hearing conference was rescheduled for January 27, 2000, at the request of the Parent.

The IHO issued a pre-hearing order on February 1, 2000, establishing the issue for hearing to be whether or not the current IEP is appropriate for the Student and is providing her with a "free appropriate public education" (FAPE). This issue was later refined into several subparts. See *infra*. Hearing dates were established for February 22 and 23, 2000, at a time and place convenient and agreeable to the parties. The IHO also extended the time frame for issuing a written decision to March 17, 2000, at the request of the Student. The IHO also advised the parties of their respective hearing rights.

On February 8, 2000, the Student refined the issue generally stated in the February 1, 2000, pre-hearing order. The specific subparts to the general issue were as follows:

1. Substitute teachers frequently employed by the School lack special education credentials. The Student's IEP provides that substitute teachers are to be furnished with a student-specific report prior to the start of class, with the substitute teacher signing the report to indicate it had been read and understood. Additionally, substitutes for paraprofessionals have not been consistently provided.
2. The mathematics software utilized by the School for the Student was too advanced for her skill level. The Parent was to be involved in the selection of appropriate mathematics software, but the Parent did not receive any replies to her correspondence in this regard.
3. The School failed to ensure continuity in the use of the "Dragon Dictate" voice recognition system, such that the Student required retraining, costing educational time. The School was also to evaluate the Student's home computer to determine whether this system could be installed, but this did not occur.
4. Although improving the memory for the Student's home computer had been discussed previously within the case conference committee and the Parent had written the School regarding this issue, no response was made by the School.
5. Although the IEP required that there be a consistent home-school log of work, assignments, and comments, with a report to be sent home every Friday by the special education teacher, apparently this was not completed on a regular basis.
6. Although the IEP required study guides be provided the Parent to assist the Student, this did not occur, resulting in the Student receiving the lowest grade in science that she had ever received.
7. Due to the Student's visual acuity problems, all instructional materials were to be enlarged, but this did not occur.
8. Extended school year and summer school were raised at the June 4, 1999, case conference committee but never resolved. As a result, the Student received neither.
9. Independent assessment results indicate the Student requires more one-to-one academic assistance, but the School prefers an "inclusion" model.

As a result of the perceived failure of the School to implement the Student's IEP, the Parent also requested compensatory educational services and out-of-pocket expenses incurred in

obtaining private reading assistance for the Student. The IHO incorporated the Parent's issues into an Order dated February 9, 2000.

The School on February 8, 2000, attempted to raise an additional issue regarding whether the Student is in need of the services listed in the Student's IEP, to which the Parent objected by letter of February 9, 2000. The IHO conducted a pre-hearing conference by telephone on February 11, 2000, and thereafter issued an Order declining to include the School's issue in the hearing, noting that this issue would be appropriate for discussion within a case conference committee meeting where, should there still be disagreement, a due process hearing could be requested.

The hearing was conducted on February 22 and 23, 2000, at a time and place convenient and agreeable to the parties. Both parties were represented by counsel at the hearing. The hearing was opened to the public at the Parent's request. The Student attended the hearing and testified.

The IHO issued his written decision on March 17, 2000. From the testimony and evidence presented at the hearing, the IHO determined twenty-eight (28) Findings of Fact and reached fourteen (14) Conclusions of Law from which he issued ten (10) Orders.

The IHO's Findings of Fact

The Student is fourteen years old and enrolled as an eighth grade student in the local middle school. She has attended the local School since pre-school and has always been determined eligible for special education services as a student with a learning disability with a borderline mild-mental handicap. Placements have ranged from self-contained classrooms to general education classes with resource room services. In 1991, a psychological evaluation found the Student had a verbal IQ of 97, performance IQ of 80, with a full-scale IQ of 86. Her strengths were in the practical application of knowledge with the ability to handle social situations and vocabulary. She has marked difficulties with mathematical skills. She also has difficulties in reproducing designs using pencil and paper. The Student's achievement tests indicate her skills in reading and arithmetic were significantly discrepant when compared to her intellectual potential. Although the Student originally received direct occupational therapy (OT) services, in later years the service has been on a monthly, consultative basis. Her visual motor integration was significantly delayed. On December 9, 1997, an optometry examination determined the Student is nearsighted (myopia) and has astigmatism. Her visual prescription correction provides the Student with perfect 20/20 vision. The Student does suffer from vertical eye muscle imbalance (eyes do not maintain perfect two-eye synchrony in vertical direction), eye muscle imbalance (each eye turns outward), convergence insufficiency (inability of both eyes to work together comfortably at close range tasks), and accommodative insufficiency (inability of eyes to sustain focus). These conditions could affect the Student's ability to read and perform

close range tasks. Although her visual problems are not a major problem for the Student, they may have some affect on her school performance. (FoFs 1, 2, 3, 4, 5, 6, 28.)

In the latter part of 1997, the Student was evaluated, although the school psychologist did not believe the results were indicative of the Student's actual abilities (verbal IQ of 63, performance IQ of 75, full-scale IQ of 65). The scores would seem to indicate a mild mental handicap. Due to the Student's irritability, affect testing was performed, which indicated the presence of some depression but not in a clinical sense. The Student did have low self-esteem related to academic performance and family areas. The Student was not considered emotionally handicapped because emotional problems were not present across all settings. An independent evaluation was conducted in November and December of 1998. The Student's mental status during the interview indicated frustration, some mild depression, some flat affect, but no oppositional behavior. She was significantly below average in visual motor integration, an indication of problems with eye-hand coordination. On the WISC-II, she scored on the low end of the borderline range of intellect with a full-scale IQ of 71. In the Woodcock-Johnson, the Student's scores were significantly discrepant with the Student's expected scores. The independent evaluator opined that the Student would need a lot of adult assistance and supervision, including intensive one-on-one academic intervention. (FoF 7, 8).

The Student has attended a local private learning center since July of 1998, working on her reading skills twice weekly at the center for one hour each session. Placement testing using the California Achievement Test indicated the Student was at the 1.4 grade level in vocabulary, 2.0 grade level in reading comprehension, and 1.7 grade level in total reading. The Student was in the average range for receptive vocabulary (auditory comprehension). In a March 1999 progress test, the Student scored at grade levels of 3.3 in vocabulary, 2.7 in reading comprehension, and 2.9 in total reading. (FoF 9.)

The Student's case conference committee (CCC) met on March 31, 1999, and June 4, 1999, to review her IEP in preparation for the 1999-2000 school year, her eighth grade year. It was noted that the Student's strengths are in auditory learning and performance. The remedial reading teacher estimated her reading level at about the fourth grade level. During the March 31, 1999, CCC meeting, it was agreed that the use of the Dragon Dictate Natural Language computer program would be investigated. This is a voice recognition system through which a person speaks and the words are then viewed on the monitor. It was further agreed that a consistent log of work assignments and comments would go home with the student on a regular basis. The program facilitator was also to send home a report each Friday to advise the Parent of the Student's assignments and progress. When the CCC reconvened on June 4, 1999, the Dragon Dictate computer program had been purchased and the Student was working on the recognition of her voice with the program. Although it was presented that the program was "up and running," this was not the case. It was agreed that the Dragon Dictate program would be shared with the Student's home computer and that increasing the memory capacity of the

Student's home computer would have to be addressed. The CCC also agreed to include the Parent in the selection of a mathematics computer program that would be loaded onto the same School computer the Dragon Dictate program was on. The Parent's interest in assisting the selection was to avoid the duplicating existing programs already used with the Student and to find more challenging programs that reduce guessing. The IEP provided that the Parent was to be provided with study guides so she could assist the Student in her studies. The Student was also to receive one-on-one services 20 to 25 percent of the time, with modifications for instructional materials to a 14 font and for 120-125 enlargement. The issue of extended school year (ESY) was not resolved. (FoF 10, 11, 12.)

Near the end of the 1998-1999 school year (the Student's seventh grade year), the voice recognition portion of the Dragon Dictate program was completed. It was at this time the Student's Least Restrictive Environment (LRE) facilitator noticed that the program also requires grammar and punctuation commands to be entered (student needs to state capital, period, comma, etc.) (FoF 13.)

All substitute teachers for the Student were appropriately licensed, albeit not in special education, and were provided with the required Student-specific report; however, there is no documentary evidence indicating that each substitute teacher signed any form or document verifying this. The substitute teachers in the Student's general education classes (science and social studies) were not provided with the Student-specific report. However, testimony indicated that when there was such a substitute, the Student did not regularly attend such classes but instead attended the resource room. On at least one occasion, the Student was sent to the office when a test was scheduled but the Parent requested the Student not take the test. (FoF 14, 15.)

The Dragon Dictate program has not been shared with the Student's home computer, nor has the memory capacity of the Student's home computer been addressed. However, although this was discussed at the CCC meeting, the IEP does not require the School to improve the Student's home computer's memory capacity. (FoF 16, 17.)

The Plato computer program used by the middle school for mathematics training is too advanced for the Student. The School purchased, without input from the Parent, a math program and loaded it into the School's computer that also includes the Dragon Dictate program. Although the weekly reports have been sent home most of the time (IHO's emphasis), there have been times when the reports have not been furnished, usually where there has been nothing to report (first week of school, ISTEP testing). Study guides for tests were provided to the Student "most of the time." The Student was supposed to take the guides home, but apparently did not always do so. (FoF 18, 19, 20.)

The Student received substantial one-on-one services of approximately 130 minutes out of a total instructional day of 354 minutes. Instructional materials, including worksheets, were not always enlarged as required. On some occasions the Student was asked if she could read the materials. If she answered that she could, the material was not enlarged. The Student was provided with an enlarged math table and a portable magnifying stick. Although the words “when needed” were struck from the IEP at the request of the Student’s representative at the March 31, 1999, CCC meeting, School personnel testified that they believed it should be the responsibility of the Student to request enlarged print materials when she was unable to read the material.(FoF 21, 22, 24.)

The CCC never formally addressed the Student’s need for ESY or summer school. School personnel believed an ESY program was not necessary because regression was not a concern. Although it appears the CCC agreed a summer school program with a special education teacher for the Student would be appropriate, no arrangements were made for the summer of 1999. (FoF 23.) Although the Student has poor writing skills that are far below an eighth-grade level, auditory learning is a strength and the Student is proficient with the use of a keyboard. (FoF 25, 26.)

The eighth-grade LRE facilitator acknowledges receiving frequent correspondence from the Parent but seldom responded to the inquiries. The facilitator, for the most part, sent home the weekly reports required by the IEP. The facilitator also questioned the necessity always to enlarge instructional materials, the amount of one-on-one assistance, and the sharing of Student-specific information with substitute teachers (out of confidentiality concerns). Substitute teachers were not instructed by the facilitator on necessary modifications for the Student, nor was the Plato math lab utilized on any consistent basis. The facilitator also believed that some of the modifications were demeaning to the Student and that the Student should be required to assume more personal responsibility. Further, the facilitator expressed reservations regarding the Dragon Dictate program, believing that the Student’s proficiency in keyboarding would be a better means for the Student to prepare written materials.

The IHO’s Conclusions of Law

Based on the foregoing, the IHO concluded the Student’s IEP was sufficient to permit the Student to benefit educationally from the instruction provided to her. However, the School did not furnish all substitute teachers with a Student-specific report prior to the beginning of class, as required by the IEP. All the substitute teachers did meet the district qualifications.

Further, the School did not share the Dragon Dictate program with the Student for use on the Student’s home computer, as required by the IEP. The need to expand the memory capacity of the Student’s home computer was never required by the CCC and was not included in the IEP.

The Student's IEP required that the Parent be involved in the selection of the mathematics computer program. However, the School purchased a program and loaded it onto the computer that also contained the Dragon Dictate program. Although the Parent objects to the purchase without her involvement, she did not present any evidence that the Plato program would be inappropriate for the Student. Nevertheless, the program should be employed on a regular basis and not sporadically.

The School has failed to implement the Student's IEP in other respects, notably by not sending home a report each Friday to keep the Student's Parent apprised of her progress; by not enlarging instructional materials as indicated; and by not ensuring study guides are provided to the Parent to assist the Student.

The Student has received appropriate one-on-one instructional assistance, as required by the IEP. ESY has not been formally discussed within the CCC, and the need for a private reading program for the Student was not part of nor required to be a part of the Student's IEP. As a result, the request for reimbursement for this private program was denied.

Although the Student does have visual problems, she does not meet the criteria for "visually impairment" under special education rules. The IEP appropriately addresses the visual problems and concerns of the Student.

The Student's IEP has provided educational benefits to the Student. As a consequence, compensatory educational services are not required and are, as a consequence, denied.

The IHO's Orders

The IHO issued ten (10) Orders, most directed at requiring the School to implement the IEP. The School is to furnish all substitute teachers with a Student-specific report prior to the beginning of classes and document that such occurred. The Dragon Dictate program is to be shared with the Student for use on the Student's home computer. "If possible," the IHO wrote, "the past training of the Student on the School computer should be down-loaded to the Student's home computer so that the Student need not again load the voice recognition and grammar on the home computer as has been done on the School computer." (Order 2.) The weekly reports are to be sent to the Parent, as required by the IEP, and this can be accomplished through the use of facsimile transmission. Study guides will be provided and enlarged, as required by the IEP. Instructional materials shall also be enlarged, as required by the IEP. The Student shall continue to receive the designated one-on-one academic assistance.

Although the Parent was not involved in the selection of the computer math program, it has already been purchased and loaded onto the computer. "[T]he spirit of the requirements of the IEP have been fulfilled." (Order 4.)

The CCC was to reconvene to address the School's obligation, if any, to pay for the cost of improving the memory of the Student's home computer for use of the Dragon Dictate program. The CCC shall also address the need for ESY or summer school.

The Student is not entitled to compensatory educational services nor is the Student entitled to reimbursement for the private reading program.

The parties were appropriately advised of their administrative appeal rights.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Parent, on behalf of the Student, requested on April 6, 2000, an extension of time to and including May 17, 2000, to prepare and file a Petition for Review. The Board of Special Educational Appeals (BSEA) granted this request and issued an Order to that effect on April 6, 2000.

The Parent's Petition for Review

On May 16, 2000, by facsimile transmission, the Parent filed a Petition for Review with the BSEA. In essence, the Parent asserts the IHO did not address all of the issues placed before him, specifically the use of the assignment notebook and the provision of study guides. In addition, the Parent objects that the IHO found the "spirit of the requirements of the IEP" was met when the School purchased the math computer program without her input, asserting that this is not a legal standard. The Parent questions the appropriateness of the computer math program, particularly as she has yet to have any input. The present level of reading of the Student, as estimated by the School, is not based upon any comparative test scores, although the private reading program does conduct periodic assessments, which were provided as evidence. The Parent represents that the Student's enrollment in the private reading program resulted from the School's failure to provide an appropriate ESY or summer school program, and that certain case law entitles the Parent to reimbursement for the program, as well as compensatory educational services for the Student.

The Student, the Parent represents, has demonstrated regression in the past, as evidenced by low ISTEP scores and purported statements by the elementary school facilitator. Her regression is in both reading and mathematics, but the Parent could only afford the reading program at the private facility. The private reading program has helped the Student make significant progress in reading, but the lack of any such assistance for math has resulted in regression, as demonstrated by assessments performed by the private facility. Accordingly, the Parent is requesting the School pay for the Student to participate in the private facility's math

program, where an appropriate version of the Plato math program is being employed. This is justified, the Parent states, because the School has not provided appropriate math instruction for three years.

The IHO, the Parent argues, should have, in determining whether or not the School provided an appropriate program to the Student, placed more weight to the School's numerous instances of failure to implement the Student's IEP and the Eighth Grade LRE Facilitator's deliberate disregard of its provisions, exercising instead unchecked discretion. Had the IHO accorded the proper weight to these transgressions, the Parent asserts, he would have found the program inappropriate and the program obtained by the Parent appropriate, such that the Parent would be entitled to reimbursement for the costs of the private reading program. In addition, the Parent adds, the private program offers a method of measuring progress and is responsive to the Parent's inquiries, while the School has no provisions for measuring the Student's progress and has acknowledged it has not been responsive to the Parent's correspondence and other inquiries.¹

The Parent also seems to be raising issues relative to the denial of due process. She complains that the IHO's cell phone rang on two different occasions during the two-day hearing, and that his answering these calls and halting the proceedings to do so were somehow "demeaning" to the proceedings and are evidence that the IHO was somehow otherwise preoccupied with certain unspecified matters. The Parent also stated the proceedings were rushed, in part because the IHO wanted to watch a basketball game on television, and that the IHO altered the proceedings by requiring the counsel for both parties to present closing arguments orally in lieu of a written statement.²

The School's Response to the Petition for Review

On May 23, 2000, the School requested an extension of time to and including June 2, 2000, to prepare and file a Response to the Petition for Review. The BSEA, by an Order dated the same date, granted the School's request.

¹The BSEA notes that the Parent, in her Petition for Review, attempts to attack the IHO's granting of an extension of time that was requested by the Parent through the Parent's legal counsel. This will be struck as inappropriate. If the Parent did not wish to request an extension of time, it is incumbent upon the Parent not to do so. The record indicates the Parent made the request and the IHO acted upon the request. That is all the record reveals.

²The BSEA notes that the Parent, through her legal counsel, submitted a pre-hearing brief that summed up the legal arguments to be presented at the hearing. Also, the BSEA adds that opening and closing arguments, written or oral, are not evidence. In this case, the record reveals that counsel for both parties agreed to present final argument orally.

The School filed on June 2, 2000, its Response to the Petition for Review. The School acknowledged the Student's IEP had not been implemented as written, but supported the IHO's finding that the IEP was reasonably calculated to provide the Student educational benefit from her program. The School argues the IHO's procedures did not deny any party due process, and that the decision to present closing argument orally rather than in writing was acceptable to counsel for both parties. The case law cited by the Parent does not support reimbursement for the private tutoring program nor does it entitle the Student to compensatory educational services. In addition, the Student's academic capabilities have been adequately documented for a number of years, and the independent evaluation does not differ significantly from the assessments performed by the School. There is no educational justification for a self-contained classroom, nor is there educational justification for ESY services.³

The School also submitted with its Response a copy of the case conference committee report from meetings conducted on May 11, 2000, and May 15, 2000, in compliance with the orders issued by the IHO. The BSEA will forward the School's documentation to the Division of Special Education, Indiana Department of Education, as a part of the compliance activities.

Review by the Indiana Board of Special Appeals

On May 22, 2000, the BSEA notified the parties that it would conduct review of this matter without oral argument and without the presence of the parties. The BSEA scheduled its review for Tuesday, June 6, 2000, in the State House offices of the Indiana Department of Education. Each member of the BSEA received a complete photocopy of the record and reviewed same. On June 6, 2000, all three members of the BSEA appeared and conducted its review.

In consideration of the record as a whole, the Petition for Review, and the Response thereto, the BSEA now makes the following Combined Findings of Fact and Conclusions of Law.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-15-5. The Board of Special Education Appeals has jurisdiction in this matter.

³The School's witnesses and its Response indicate that the School believes "severe regression" is the sole determining factor for ESY services. In the School's Response on p. 5, the statement appears: "Absent significant regression, there is no entitlement to ESY." This is not a correct statement. Although "significant regression" is an important measure and the one employed most often, it is not the only measure that can create an "entitlement to ESY." The federal regulation is not so restrictive. See 34 CFR §300.309.

2. The Parent does not object to any of the Findings of Fact determined by the IHO. Rather, she objects to the legal conclusions drawn from these facts. Accordingly, the BSEA adopts as though fully stated herein all Findings of Fact determined by the IHO.
3. Federal law and U.S. Supreme Court case law do support that a student with a disability who requires special education and related services is entitled to a “free appropriate public education” (FAPE) that is individualized to meet the unique needs of the student. However, FAPE does not require the student’s IEP to “maximize each child’s potential commensurate with the opportunity provided other children.” The IEP must be reasonably calculated to enable the student to receive educational benefit. In this case, the proposed IEP does consider the Student’s unique educational needs and does permit the Student to benefit educationally from the instruction. (Conclusions of Law Nos. 1, 2, and 14).
4. The School was remiss in not ensuring that all services described in the Student’s IEP were, in fact, provided. This included not providing Student-specific reports to all substitute teacher prior to the beginning of class; not sharing the Dragon Dictate program with the Student for use on the Student’s home computer; purchasing a mathematics computer program without parental input; not providing weekly progress reports on a consistent basis; and not providing all the study guides; not enlarging all instructional materials. (Conclusions of Law Nos. 4, 6, 7, 8, and 10).
5. The Student’s case conference committee has discussed certain services but has not committed resources or otherwise decided such services are necessary in order to provide the Student with a FAPE. The areas of discussion for which no determinations have been made include the improving of the memory capacity of the Student’s home computer and the need for ESY or summer school. (Conclusions of Law Nos. 5 and 11).⁴
6. All substitute teachers met the legal requirements for serving as substitute teachers. (Conclusion of Law No. 3).

⁴As noted previously, the BSEA did receive, as attachments to the School’s Response, the Case Conference Committee Report indicating that the School has satisfied the Orders of the IHO by convening the Student’s Case Conference Committee to discuss issues for which no specific determination had been made. The Report will be forwarded to the Division of Special Education, Indiana Department of Education, for inclusion as documentation of compliance with the IHO’s Orders. As a consequence, the IHO’s Orders Nos. 3 and 9 are moot.

7. Although the Parent did not participate in the selection of the mathematics program, the Parent provided no testimony or other evidence that the mathematics program was inappropriate for the Student. (Conclusion of Law No. 6).
8. The Student is receiving appropriate one-to-one instruction, as required by the Student's IEP. (Conclusion of Law No. 9).
9. The Student's IEP does not support the need for an outside reading program. (Conclusion of Law No. 12).
10. Although the Student has visual problems, she does not meet the criteria for "visual impairment" under the Indiana State Board of Education's rules and regulations for special education. The Student's IEP is appropriate to meet the visual problems and concerns of the Student. (Conclusion of Law No. 13, as amended).
11. All Orders of the IHO are appropriate as written.
12. The IHO conducted the administrative hearing consistent with the requirements for due process. Isolated telephone calls and references to a desire to watch a basketball game do not evidence an arbitrary or capricious nature in the conduct of the hearing. The record demonstrates that all parties were provided ample opportunity to present testimony and evidence. The record (Transcript at P. 579) indicates the IHO would have permitted the parties to file post-hearing briefs, if they so wished. The IHO based his decision on the record as created by the parties. No party was denied due process.

ORDERS

1. The Parent is not entitled to reimbursement for the outside reading program.
2. The Student is not entitled to compensatory educational services.
3. The IHO's decision is affirmed.
4. No party was denied process.
5. Any other motion not specifically addressed herein is deemed denied.

Date: June 6, 2000

/s/ Raymond W. Quist, Ph.D., Chair
Indiana Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Indiana Board of Special Education Appeals shall have thirty (30) calendar days from receipt of this written decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.

